STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO HUERTA RODRIGUEZ,

Defendant-Appellant.

UNPUBLISHED
February 25, 2003

No. 227863
St. Clair Circuit Court
LC No. 98-001730-FC

Before: Cooper, P.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; two counts of assault with intent to murder, MCL 750.83; carrying a firearm with unlawful intent, MCL 750.226; and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of twenty to fifty years' imprisonment for the two assault with intent to murder convictions, four to six years' imprisonment for the felonious assault conviction, and five to seven and a half years' imprisonment for the carrying a firearm with unlawful intent conviction, to be served consecutive to a two-year term for the felony-firearm conviction. Defendant appeals by leave granted. We affirm.

The incident giving rise to this case occurred over a three-hour period in the early morning hours of March 30, 1998. Police responded to a domestic dispute at a residence where shots had been fired. Upon arrival, police found defendant outside the house holding a rifle. Defendant failed to comply with repeated police orders to drop his weapon. Defendant fled into a wooded area. Shortly after 3:00 a.m., defendant emerged from the woods and shots were fired. According to prosecution witnesses, defendant pointed his rifle at two Michigan State Police troopers and fired one round. The troopers returned fire causing defendant to sustain nine gunshot wounds. The defense's theory of the case was that defendant did not fire at the troopers and that they fired at him without cause.

I. Change of Venue

Defendant argues that the trial court erred in denying his motion to change venue. We disagree.

This Court reviews the grant or denial of a motion to change venue for an abuse of discretion. *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997). An abuse of

discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). This Court reviews de novo defendant's claim that he was denied a fair and impartial trial because jurors were tainted by pretrial publicity. *People v Manser*, 250 Mich App 21, 24; 645 NW2d 65 (2002).

"The right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial 'indifferent' jurors." *Jendrzejewski*, *supra* at 501, quoting *Irvin v Dowd*, 366 US 717, 722; 81 S Ct 1639; 6 L Ed 2d 751 (1961). Generally, a defendant "must be tried in the county where the crime is committed." *Jendrzejewski*, *supra* at 499, citing MCL 600.8312. "[I]n special circumstances where justice demands or statute provides," a trial court may order a change of venue to another county. *Jendrzejewski*, *supra* at 500.

Defendant first claims that a change of venue was appropriate on the basis of pretrial publicity. In examining the totality of the circumstancing to determine whether a defendant's trial was fundamentally unfair, this Court "distinguish[es] between largely factual publicity from that which is invidious or inflammatory." *Jendrzejewski*, *supra* at 502, 504, quoting *Murphy v Florida*, 421 US 794, 800; 95 S Ct 2031; 44 L Ed 2d 589 (1975). "Consideration of the quality and quantum of pretrial publicity, standing alone, is not sufficient to require a change of venue." *Jendrzejewski*, *supra* at 516. "The reviewing court must also closely examine the entire voir dire to determine if an impartial jury was impaneled." *Id.* Generally, "if a potential juror, under oath, can lay aside preexisting knowledge and opinions about the case, neither will be a ground for reversal of a denial of a motion for a change of venue." *Id.*, citing *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993).

In this case, defendant did not provide, or even specify, the sources of the alleged publicity. Only one juror stated that he had read an article in the newspaper when the event occurred, but he indicated that he would be fair to defendant. Defendant did not challenge the juror for cause or exercise a peremptory challenge to remove him. Defendant did not ask the potential jurors about exposure to pretrial publicity. The record provides no basis from which to discern the nature or extent of the alleged publicity, whether it was inflammatory in tone or content, or whether it was just factual reporting of news events and court proceedings. *Jendrzejewski*, *supra* at 504. Accordingly, we find no abuse of discretion in the trial court's denial of defendant's motion to change venue on this basis.

Defendant next argues that only "one minority" was in the jury pool. The prospective juror was an African-American woman, whom the court excused. Defendant does not show that a particular racial or ethnic minority was underrepresented as a result of systematic exclusion. "To establish a prima facie violation of the fair cross-section requirement, a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000). Defendant does not make this argument. Accordingly, a change of venue was not warranted on this basis.

Defendant also argues that a change of venue was warranted because "most of the potential jurors in this case either knew a police officer, were related to a police officer, or in Mr. Brown's case, had contacts with the media." Defendant's claim is not supported by the record. Although many of the prospective jurors indicated that they had some connection with law

enforcement through family or acquaintances, they assured the court that they could be impartial. After the jury was impaneled, defendant's argument addressed one juror, Mr. Brown, a retired newspaper reporter, whom defendant argued had connections with law enforcement agencies. The juror assured the court that he had no bias, and defendant did not exercise his remaining peremptory challenge to excuse him. Defendant has not shown that the trial court abused its discretion in denying his motion for a change of venue, or that he was denied a fair and impartial jury.

II. Evidence of Defendant's Clothing

Defendant argues that the trial court erred in excusing the prosecution from producing the clothes he wore on night of the shooting. The trial court concluded that the evidence was not relevant. Defendant argues that the location of the bullet holes in his clothing tended to show that (1) defendant did not fire and (2) the troopers shot at defendant from the side and the back while defendant was fleeing. We disagree.

This Court reviews decisions regarding the admissibility of evidence for an abuse of discretion. *People v Washington*, 251 Mich App 520, 524; 650 NW2d 708 (2002); *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000). An abuse of discretion occurs when an unprejudiced person, considering the facts on which the court acted, would conclude that there was no justification or excuse for the court's ruling. *Id.* The trial court's decision on close evidentiary questions cannot "by definition" be an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

Generally, all relevant evidence is admissible, and evidence that is not relevant is not admissible. MRE 402; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000).

Defendant fails to articulate how the condition of his clothing and the location of the bullet holes would have any probative value regarding whether defendant fired at the troopers. Further, evidence suggesting that the bullets entered defendant's body from the side and from the rear was presented through Dr. Thabit Bahhur, who testified in detail about the nature and location of defendant's gunshot wounds. We find no abuse of discretion in the trial court's ruling.

III. Appointment of Expert Witnesses

Defendant argues that he was denied due process by the trial court's denial of his motion for the appointment of two expert witnesses, a firearm and ballistics expert and a forensic pathologist. In order to justify the appointment of an expert witness for an indigent defendant at public expense, the defendant must show that he cannot safely proceed to a trial without the proposed witness. MCL 775.15; *People v Herndon*, 246 Mich App 371, 399; 633 NW2d 376 (2001). We review a trial court's denial of a defendant's motion to appoint an expert witness for an abuse of discretion. *Id.* at 398.

Defendant argued that a firearms and ballistics expert was necessary to "testify to [ ] firearm nomenclature and projectile trajectory." Specifically, defendant stated his concerns regarding the fact that defendant's rifle had a live round in the chamber when he was apprehended, the manual operation necessary to fire a second round, and the failure to find a shell casing at the scene to represent the shot that defendant was alleged to have fired at the troopers. Defendant also argued that an expert was necessary to testify to "the trajectory of the spent casing from a bolt action."

On appeal, defendant does not explain how the experts he sought would have aided his defense. Lieutenant Michael Thomas, a firearms identification expert, testified about the functioning of defendant's rifle, the manner of ejecting a spent casing, and the distance an ejected casing would be expected to travel. The prosecution witnesses offered possible explanations why no casing was found. Defendant does not explain how a ballistics and firearms expert would have amplified or contradicted the testimony offered at trial. We conclude that the trial court did not abuse its discretion in denying defendant's motion.

Defendant also asked the trial court to appoint a forensic pathologist to testify to the nature of defendant's bullet wounds. Defendant does not explain the necessity of this testimony. As noted previously, Dr. Bahhur testified to the nature and location of defendant's injuries. We find no abuse of discretion in the trial court's denial of defendant's motion to appoint a forensic pathologist.

IV. Sequestration of Witnesses

Defendant argues that the trial court erred in refusing to sequester witnesses until after opening statements were made, and in denying his motion for a mistrial on that basis. We disagree.

In its discretion and for good cause shown, a trial court may exclude witnesses from the courtroom when they are not testifying. MCL 600.1420; *People v Jehnsen*, 183 Mich App 305, 308-309; 454 NW2d 250 (1990); MRE 615. We review for an abuse of discretion both the trial court's decision whether to order the sequestration of a witness and its ruling on a motion for a mistrial. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001); *Jehnsen*, *supra* at 309. "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). We review de novo a defendant's claim that he was denied his constitutional right to a fair trial. *People v Eaton*, 241 Mich App 459, 461; 617 NW2d 363 (2000).

Defendant argues that the witnesses should have been sequestered during voir dire and opening statements because their presence afforded them the opportunity to identify the issues defendant intended to raise and ways in which they could tailor their testimony accordingly. Defendant does not specify which defense issues the witnesses were able to undermine, nor does defendant cite any testimony subsequently offered by the witnesses that was influenced by their presence during voir dire and opening statements. Moreover, defendant does not argue that he was prejudiced by the denial of his motion to sequester the witnesses; he merely argues that their presence in the courtroom gave them the opportunity to undermine his defense. We find no merit to defendant's argument.

V. Reference to Defendant's Crime

Defendant argues that the trial court should have granted a mistrial on the basis of Sergeant Richard DeShon's testimony that "a warrant was served on him [defendant] reference to the crime that he committed." We disagree.

The challenged comment was not responsive to the prosecution's question. Generally, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). The trial court sustained defendant's objection to the remark and immediately corrected the officer, saying, "it's alleged to have been committed[.]" We agree with the court's conclusion that "this officer's single reference was not inherently prejudicial nor was it intentionally interjected[.]"

Defendant also argues that the prosecution implied that defendant was in jail for another crime by asking DeShon whether defendant was in custody at the time he served the warrant on him, to which DeShon answered, "Yes, he was." We disagree. First, defendant did not object to the prosecution's question. Second, no reference was made to any other crimes, and in the context of the testimony it is not likely that the jury would infer that the reference to defendant's custody pertained to other, unmentioned crimes rather than to the instant charges. The trial court did not abuse its discretion in denying defendant's motion for a mistrial. *Rodgers*, *supra* at 714; *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999).

VI. 911 Tape

Defendant argues that the trial court erred in refusing to suppress an audiotape of a 911 call because the prosecution failed to provide defendant with an accurate copy of the tape. We disagree.

Defendant claims that the prosecution did not provide the tape to defendant in a timely manner. Defendant's argument on appeal mischaracterizes the prosecution's statements regarding the 911 tape. After reviewing the record for the full context of the exchange at trial, it appears that the prosecution gave defense counsel a copy of the entire tape, which included "the portion" at issue, but told defense counsel that the tape would be edited for purposes of trial. The prosecution then provided a second tape to defense counsel, without the portion at issue. The prosecution acknowledged that it had not provided defense counsel with a separate tape of *only* the portion at issue, but agreed to do so. Defense counsel did not dispute that he had received the original 911 tape in its entirety; rather, defense counsel stated that he had not listened to the tape. We conclude that the trial court did not abuse its discretion in admitting the portion of the 911 tape. *Washington*, *supra* at 524; *Schutte*, *supra* at 715.

Finally, we do not consider defendant's argument that the tape should have been excluded because it was not transcribed in its entirety. Defendant waived review of this issue by withdrawing his objection.

VII. Demonstrative Evidence

Defendant argues that the trial court abused its discretion in excluding demonstrative evidence of the manner in which shell casings are ejected from his rifle. Defendant maintains

that such a demonstration, in conjunction with the evidence that no spent casing was found, would tend to refute the prosecution's theory that defendant fired at the troopers. Defendant also claims that the evidence would have helped the jury to understand Lieutenant Thomas' testimony regarding the distance that an ejected casing would travel and the variables that affect the area in which a casing would be expected to be found.

Demonstrative evidence is admissible where it may aid the fact finder in reaching a conclusion on a matter material to the case. *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998). "As with all evidence, to be admissible, the demonstrative evidence offered must satisfy traditional requirements for relevance and probative value in light of policy considerations for advancing the administration of justice." *Id.* The trial court excluded the evidence on the ground that it was not relevant.

Lieutenant Thomas testified that many variables affect the expected location of an ejected casing, such as whether the person firing the rifle was moving, the position and manner in which the rifle was held, and the amount of force with which the cartridge was pulled from the chamber. The uncertainty of the variables at work on the night of the shooting, and accordingly, the difficulty of attempting to simulate the conditions that existed that night, militate against admission of the evidence. Notably, defendant wanted to demonstrate using the shell casings that were fired at the scene during the investigation, not using new shells. We conclude that the trial court did not abuse its discretion in ruling that the demonstrative evidence would not be relevant. *Castillo*, *supra* at 444.

Further, defendant's theory that he did not fire his weapon was illustrated by the police's failure to find a shell casing from defendant's rifle in the area where defendant was shot, as well as Lieutenant Thomas' testimony that a casing would likely be found within a four- to five-foot radius of the shooter. Defendant does not state how the demonstrative evidence would have assisted the jury in light of the other evidence presented at trial.

VIII. Evidence of FBI Fire Fight

Defendant argues that the trial court abused its discretion in allowing Lieutenant Thomas to testify about a 1986 FBI fire fight as it concerned a person's ability to fire a rifle despite having been fatally wounded. We disagree.

Defense counsel cross-examined Lieutenant Thomas about the operation of defendant's rifle and posed a hypothetical situation calling into question the ability of an injured person to operate a rifle. On redirect examination, the prosecution asked Lieutenant Thomas about an FBI fire fight in which a person who was fatally injured was still able to fire a rifle. Over defense counsel's relevancy objection, the trial court allowed the evidence because it was responsive to defendant's questions on cross-examination and not beyond the scope of cross-examination.

The trial court did not abuse its discretion in allowing the brief testimony about the FBI fire fight. *Washington*, *supra* at 524; *Schutte*, *supra* at 715. The testimony was responsive to defendant's cross-examination of Lieutenant Thomas as it merely countered the hypothetical situation posed by defense counsel. Defendant's argument on appeal that MRE 403 should have precluded admission is without merit. Defendant fails to show how the admission of this

evidence denied him a fair trial. See *People v Bahoda*, 448 Mich 261, 280; 531 NW2d 659 (1995).

IX. Prosecutorial Misconduct

Defendant argues that the prosecution engaged in misconduct by suggesting that a defense witness was lying. This issue is not preserved. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Because defendant did not object to the prosecution's remark, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Shutte*, *supra* at 720. We review allegations of prosecutorial misconduct on a case-by-case basis to determine if a defendant has been deprived of a fair and impartial trial. *Schutte, supra* at 721.

While responding to a defense objection, the prosecution suggested to the trial court that defense witness Belen Huerta-Rodriguez may be lying. Defendant had objected to the prosecution playing an audiotape for the witness to refresh her recollection. The court remarked, "Maybe she doesn't recall because she wasn't there in the midst of all this conversation." The prosecution countered, "Perhaps she's lying." The court then sustained the defense's objection to the tape and the prosecution resumed questioning the witness.

The prosecutor's remark was not misconduct. A prosecutor may argue that a witness is not worthy of belief or is lying. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Here, the prosecutor was merely stating its reason for wanting to use the tape to challenge the witness' credibility. The prosecutor did not affirmatively state that the witness was lying, nor did he effectively vouch for the credibility of the police witnesses, as defendant contends. Defendant has not demonstrated plain error.

X. Jury Instructions

Defendant argues that the trial court erroneously denied his request to instruct the jury on the following cognate lesser offenses: (1) intentionally pointing a firearm without malice, CJI2d 11.23, (2) discharge of a firearm while intentionally aimed without malice, CJI2d 11.24, (3) reckless or wanton use of a firearm, CJI2d 11.26, and (4) firearm discharge, CJI2d 11.37.[1]

Our Supreme Court's recent decision in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002) is dispositive of this issue. In *Cornell*, the Court held that MCL 768.32(1) does not allow a jury to consider offenses that are cognate lesser offenses. *Cornell, supra* at 353-359; *People v Alter*, ___ Mich App ___; ___ NW2d ___ (2003) (Docket No. 228005, rel'd 1/24/03), slip op pp 3-4. Accordingly, defendant was not entitled to have the jury instructed on these lesser offenses.

XI. Sufficiency of the Evidence

Defendant states his issue as a challenge to the jury verdict on the basis of the great weight of the evidence. Defendant did not move for a new trial on this basis, and therefore this

[1] Defendant labels these offenses "lesser included offenses". In point of fact they are cognate lesser offenses.

issue is not preserved. MCR 2.611(A)(1)(e); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997); *People v Dukes*, 189 Mich App 262, 264; 471 NW2d 651 (1991). However, in substance defendant's argument challenges the sufficiency of the evidence supporting his convictions, the preservation of which requires no special action in the trial court. *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999).

When reviewing the sufficiency of the evidence supporting a conviction, this Court analyzes the evidence presented in the light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the offense. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). The intent to kill may be proven by inference from any facts in evidence. *Id.* Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The prosecution presented sufficient evidence to support defendant's convictions. Numerous witnesses testified to seeing defendant carrying a rifle. He continued to carry it after police officers ordered him several times to drop his weapon. Witnesses testified to seeing defendant point a rifle at one of the woman present at the house. Troopers Michael Bunk and Toby Marshall testified consistently that defendant fired his rifle in their direction. They perceived something pass between them when they were approximately three feet apart. Several other police officers testified to hearing a single shot that was distinctively different from the shots that followed. When defendant was apprehended, he told the troopers that if he had had the chance, he would have killed them all. Viewed in the light most favorable to the prosecution, a rational jury could find that the elements of felonious assault, assault with intent to murder, carrying a firearm with unlawful intent, and felony-firearm were proven beyond a reasonable doubt. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995).

XII. Admission of Defendant's Statement

Defendant argues that the trial court abused its discretion in admitting into evidence defendant's statement to police after the shooting that if he would have had the chance, he "would have killed all you motherfuckers." Defendant maintains that the statement was not relevant, and that its prejudicial effect substantially outweighed any probative value. We disagree.

Defendant's statement was highly probative of his intent at the time of the shooting. Defendant made the statement to the police troopers and officers on the scene as they apprehended him immediately after the shooting. The substance of the statement is a clear expression of defendant's intent to kill the troopers, stated in the past tense. An actual intent to kill is an element of assault with intent to murder. *Barclay*, *supra* at 674. The probative value of the statement is great, and is not outweighed by its prejudicial effect. MRE 403; *Sabin (After Remand)*, *supra* at 58. The trial court did not abuse its discretion in admitting the statement. *People v Small*, 467 Mich 259, 261; 650 NW2d 328 (2002).

XIII. Ineffective Assistance of Counsel

Defendant argues that he received ineffective assistance of counsel. Defendant contends that his attorney was ineffective for failing to make a MRE 403 objection to the testimony about the FBI fire fight, for failing to move for a new trial on the basis of the great weight of the evidence, and for failing to properly issue subpoenas. Because defendant did not move for a *Ginther*[2] hearing, our review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant first claims that his counsel was ineffective for failing to object to testimony about the FBI fire fight under MRE 403. This argument has no merit. As discussed previously, the trial court properly admitted the testimony elicited by the prosecution on redirect examination because the evidence was responsive to defense counsel's cross-examination. Further, the probative value of the evidence was not outweighed by its prejudicial effect. MRE 403. Counsel is not required to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant also argues that his counsel was ineffective for failing to preserve his claim that the verdict was against the great weight of the evidence. Essentially defendant's argument challenges the sufficiency of the evidence supporting his convictions. Challenges to the sufficiency of evidence do not need to be raised in the trial court; therefore, defendant's counsel was not ineffective in this regard. Moreover, in light of the consistent testimony of numerous witnesses, the great weight of the evidence clearly supported the jury's verdict. Defense counsel was not ineffective for failing to move for a new trial on this basis.

Lastly, defendant argues that his counsel was ineffective for failing to properly serve subpoenas, which were the subject of a prosecution motion to quash before trial. The trial court granted the prosecution's motion to quash the subpoenas on relevancy grounds. Defendant does not address the relevancy of the evidence on appeal, nor does defendant state how the evidence he sought through the subpoenas would have assisted his case. Because the court's ruling was based on relevancy, any deficiency in counsel's handling of the subpoenas did not prejudice defendant. Defendant has not demonstrated that he received ineffective assistance of counsel.

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

XIV. Cumulative Error[3]

Defendant has failed to show any error in this case. Accordingly, we find no merit to defendant's claim that cumulative error requires reversal.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Michael J. Talbot

[3] At oral argument counsel for defendant withdrew two issues regarding defendant's right to appeal and his right of allocution, designated in defendant's brief as Issues XIV and XV, respectively.